

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA
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4 **In Re: Bard IVC Filters**) MD-15-02641-PHX-DGC
Products Liability Litigation)
5)
6) Phoenix, Arizona
7) June 21, 2016
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21 **BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE**

22 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

23 **FOURTH SCHEDULING CONFERENCE**
24

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P R O C E E D I N G S

THE COURTROOM DEPUTY: MDL case 15-2641, Bard IVC
Filters Products Liability Litigation, on for the Fourth
Scheduling Conference.

Will the parties please announce.

MR. BOATMAN: Good morning, Your Honor. Bob Boatman,
Ramon Lopez, and Paul Stoller for the plaintiffs. We have
other members of the PLC that will be speaking today and I'll
introduce them as their issue comes up.

THE COURT: All right. Good morning.

MR. LOPEZ: Good morning, Your Honor.

MR. STOLLER: Morning, Your Honor.

MR. NORTH: Good morning, Your Honor. Richard North
on behalf of the defendants. And with me today from my office
at Nelson Mullins is Kate Helm, and then we have Mr. Condo and
Amanda Sheridan from Snell & Wilmer, and then Matthew Lerner,
my partner.

THE COURT: All right. Good morning.

Counsel, I'd like to start by addressing the
privilege issue that I asked you all to provide additional
briefing on.

I've read your supplemental memoranda that were filed
yesterday, and I've read the exhibits to the memoranda. I'm
interested in additional thoughts you have now that you've

10:02:44 1 seen each other's memoranda. This is all in support of the
2 plaintiffs' motion to compel, so why don't we start with
3 plaintiffs' counsel.

4 MR. COMBS: Good morning, Your Honor. Lincoln Combs
10:03:03 5 for the plaintiffs.

6 I don't think anything in the briefing changed our
7 position, Your Honor. It's admittedly a close call and
8 difficult choice, I think, between the two, but I think at the
9 end of the day it's only logical that New Jersey, the Bard
10:03:19 10 headquarters where all of the legal advice emanates from and
11 where all the corporate decisions are ultimately made,
12 controls the privilege log issue. And that's certainly the
13 only law that was ever debated by the parties.

14 If you look at Bard's privilege logs, they actually
10:03:40 15 reference some of the language from the kind of general
16 federal common law in Vioxx that mirrors New Jersey law on,
17 for example, disseminating communications. They talk about
18 two employees who needed this for their job description. That
19 almost exactly parallels the Vioxx language.

10:04:02 20 So I think all along it's been the presumption that
21 it was federal common law, which is basically the same as New
22 Jersey law. And so this Arizona law kind of came as a curve
23 ball when Bard filed its response. So I think that really
24 goes to the heart of the issue that really it's been an
10:04:21 25 attempt by Bard to kind of shoehorn in new law they think is

10:04:26 1 favorable to them. So I don't think our position has changed,
2 Your Honor.

3 THE COURT: Let me ask you a couple of questions,
4 Mr. Combs.

10:04:52 5 The inquiry under Section 139, Comment (e), that is
6 most relevant, in my view, is where or if a prior relationship
7 existed between the parties to the communication. It's not
8 between Bard and its corporate parent, it's not between Bard
9 and the plaintiff, it's the parties to the allegedly
10:05:29 10 privileged communication.

11 And I guess the question is what do I do in a case
12 where there's 133 communications with different parties? Do
13 we really try to do a communication-by-communication
14 determination? Which, to me, is problematic. I mean the
10:05:58 15 notion that in a single case the law that applies could change
16 from e-mail to e-mail depending on who happens to be cc'd or
17 is writing or responding sounds real difficult to apply, and
18 impossible for parties to predict ahead of time.

19 So I'm interested in whether you think that's what
10:06:20 20 you think I ought to be able to be doing, literally a
21 communication-by-communication determination.

22 And the second question is, if I'm not going to do
23 that, where is it that you think the parties to the
24 communication -- well, do you think there was a prior
10:06:34 25 relationship between the parties to the communication? And,

10:06:37 1 if so, where do you think it was centered?

2 MR. COMBS: I'll answer the second question first. I
3 think obviously the Bard employees, the moment they're hired
4 they have a relationship with Bard's attorneys. And it's
10:06:51 5 not -- I think --

6 THE COURT: You mean the moment the attorneys are
7 hired the employees have a relationship?

8 MR. COMBS: Either/or, yeah. Certainly prior to any
9 communications. At the moment the attorney is hired -- and
10:07:03 10 I'm -- I was thinking of it more in the context of in-house
11 counsel communicating with the employee. When the employee is
12 hired, he forms a relationship with Bard legal department.

13 It would be the same analysis for hiring outside
14 counsel.

10:07:16 15 But most of the communications at issue, especially
16 in the sampling, are with in-house counsel or dissemination of
17 in-house counsel's legal advice.

18 So I think when I read the Restatement comment,
19 Comment (e), on that factor it seemed like they were trying to
10:07:31 20 get at somebody going out of state to talk to a lawyer or
21 accountant or whatever. In the corporate context, it seems
22 like that's obvious that there's a prior relationship between
23 the corporation's legal department and their in-house lawyers
24 and their employees.

10:07:49 25 THE COURT: Assuming that's true, where is it

10:07:54 1 centered?

2 MR. COMBS: In New Jersey, Your Honor. The
3 headquarters of Bard where all the legal advice emanates from
4 and where all the decisions are ultimately made, and where the
10:08:08 5 lawyers were reasonably relying on and advising. We cited
6 some case law to that effect.

7 So I don't think Bard is giving different legal
8 advice on privilege and acting differently depending upon
9 where its subsidiaries are.

10:08:23 10 To the extent a wholly owned subsidiary in even this
11 sense is really a separate entity, which we would argue is not
12 the case and Bard should be treated as one attorney and one
13 client, one entity, for this purpose.

14 To answer your other question about individualized
10:08:39 15 analysis, I agree, Your Honor, that there should be a
16 presumption of which law applies, or one forum has the
17 significant relationship to this litigation, to the
18 communications at issue. However, Section 139(2) does require
19 an individualized analysis of certain types of communications
10:08:59 20 because there's situations where New Jersey law is going to
21 govern but Arizona law, which has in some areas a narrower
22 privilege, should still apply because 139 favors
23 admissibility. And those factors, especially materiality, are
24 going to have to be on individualized basis.

10:09:17 25 So we'd argue, for example, like, two Arizona Bard

10:09:21 1 employees communicating with each other, that's definitely not
2 privilege under Arizona law which requires communication
3 between an attorney or their staff communicating the
4 attorney's advice, and there's no reasonable expectation two
10:09:35 5 Bard employees in Arizona communicating with each other
6 wouldn't be subject to Arizona's law. There's no strong
7 countervailing consideration, I think is the language of the
8 Restatement, to not apply Arizona law in that situation.

9 So there is somewhat of an individualized
10:09:52 10 determination under the second part of the analysis,
11 Subsection 2 of 139.

12 THE COURT: Do you agree that Bard Peripheral
13 Vascular is a separate corporation from the parent? It is its
14 own corporation?

10:10:11 15 MR. COMBS: It is an Arizona corporation, yes. It's
16 a business entity filed with the Arizona Corporation
17 Commission, yes.

18 THE COURT: And you agree that its principal place of
19 business is Arizona?

10:10:24 20 MR. COMBS: Yes, Your Honor. I just -- we would
21 argue for this purpose, this analysis, it should be -- Bard
22 should be treated as one entity. And there's a case that we
23 cited that goes through -- there's lots of context where a
24 parent and wholly subsidiary entity -- wholly owned subsidiary
10:10:44 25 are treated basically as one entity in different legal

10:10:47 1 contexts.

2 THE COURT: Okay. Thank you.

3 MR. NORTH: Your Honor, Ms. Helm will address the
4 issue on behalf of the defendants.

10:11:01 5 THE COURT: Okay.

6 MS. HELM: Thank you, Your Honor.

7 We have an interesting situation where once --

8 THE COURT: Pull both mics in front of you, would
9 you. Thanks.

10:11:18 10 MS. HELM: Is that better?

11 THE COURT: Yes.

12 MS. HELM: Thank you. Apologize.

13 We have an interesting situation where the internet
14 and technology has once again gotten ahead of the law in this
10:11:27 15 case. Neither side located or was able to point to any cases
16 that specifically address the issue before the Court where you
17 have two clients located in two different geographic
18 locations.

19 But I will address the two questions that the Court
10:11:46 20 asked right off the bat. And the first question was, was
21 there a prior relationship? And the answer is yes.

22 And under the Restatement, the Court should look to
23 the state that has the most substantial relationship to that,
24 those communications. That is Arizona. BPV is not only an
10:12:07 25 Arizona corporation with its principal place of business in

10:12:10 1 Arizona, the communications at issue relate to activities that
2 took place in Arizona. The privilege log relates to issues
3 relating to the design, the marketing, the monitoring, and
4 even lawsuits relating to the IVC filters at issue.

10:12:29 5 The undisputed evidence before the Court through the
6 declaration of Mr. Carr and in his deposition is that those
7 activities all took place in Arizona. There were Bard BPV
8 employees in Arizona that were responsible for that. In fact,
9 Mr. Carr testified in a 30(b)(6) deposition that Bard, C.R.
10:12:52 10 Bard, provided quality processes, regulatory processes, but
11 the decisions were made in Arizona. The communications with
12 the FDA came from Arizona. The 132 entries on the sampling of
13 the privilege log relate directly to those specific activities
14 that are at issue in the lawsuit and occurred in Arizona.

10:13:19 15 The fact that the communications came from New Jersey
16 is not the standard. That would be like saying I provided
17 advice to a client in Arizona so Georgia law applies. And the
18 Restatement in Section (e) clearly looks at where it was
19 received. But for purposes of the prior relationship, it is
10:13:42 20 centered around activities in Arizona. Even the
21 communications that were between, for example, an in-house
22 lawyer in New Jersey and another employee in New Jersey relate
23 directly to the activities and the events and the actions of
24 BPV in Arizona.

10:14:10 25 And Mr. Combs mentioned that in the privilege logs we

10:14:15 1 didn't refer to Arizona law and they made a comment in their
2 brief that in the meet and confer we didn't refer to Arizona
3 law.

4 I would remind the Court in Case Management Order
10:14:31 5 Number 2 you gave the parties instruction how to handle the
6 privilege log issues, and I'm paraphrasing your order but you
7 said follow the work product of the Nevada case that had
8 previously addressed a number of privilege log issues, and
9 then you specifically said that this does not preclude the
10:14:47 10 parties from arguing that different legal standard or
11 different law applies should the privilege log issues get
12 before the Court. That's exactly what has happened.

13 We met and conferred. We discussed document by
14 document. Frankly, we didn't have a whole lot of discussion
10:15:03 15 about the law other than the ruling in the *Phillips* court in
16 Nevada until we started the briefing on the motion to compel
17 and we saw that the court -- the plaintiffs had not addressed
18 the conflict of law, choice of law issue required under 501.

19 So the fact that I didn't specifically address
10:15:21 20 Arizona law or that we discussed different topics is not
21 dispositive, and, frankly, I don't even think should be
22 considered because the court recognizes 501 requires a choice
23 of law analysis.

24 So I believe, again, our position is no different
10:15:39 25 than it was, just like the plaintiffs', in the papers. These

10:15:43 1 communications are centered around activities and events and
2 decisions being made in Arizona. The information is coming to
3 Arizona employees who are ultimately having to make decisions
4 based on legal advice.

10:15:59 5 There is no question the attorneys are in New Jersey.
6 None whatsoever. We don't dispute that. We also don't
7 dispute there are a small handful of communications that,
8 based on the documents currently before the Court, are
9 limited, did not appear to come to New Jersey -- I mean to
10:16:16 10 Arizona. Excuse me. But, again, they address activities
11 specifically relating to BPV's actions, BPV's work, the claims
12 against BPV.

13 THE COURT: Question about Subsection (e), or Comment
14 (e). By using the phrase "prior relationship," it appears to
10:16:42 15 me what the drafters of the Restatement are referring to is a
16 relationship that existed prior to the communication in
17 question. And the relationship is not, as I mentioned,
18 between Bard Peripheral Vascular and Bard Incorporated, which
19 is the relationship you addressed in your supplemental
10:17:05 20 memorandum, it's between the parties to the communication.

21 So if we assume for a minute that many or maybe even
22 most of these communications are between a BPV employee in
23 Arizona and a Bard corporate lawyer in New Jersey, where do
24 you think the relationship existed or was centered between
10:17:29 25 those people before the communication in question?

10:17:34 1 MS. HELM: It was centered in Arizona.

2 THE COURT: Why?

3 MS. HELM: Because the BPV employee in Arizona is
4 responsible for the actions. All of the events for which
10:17:47 5 they're seeking legal advice are occurring in Arizona. The
6 actors are in Arizona. BPV is an Arizona resident.

7 So if I have a relationship with a client in South
8 Carolina and I physically sit in Georgia, the fact that I'm in
9 Georgia is not a determining factor. The privilege belongs to
10:18:13 10 the client, not to the lawyer. And the fact that the
11 lawyer -- I can't imagine the chaos it would create if you
12 said the privilege is triggered by where the lawyer sits as
13 opposed to where the client is and where the actions are going
14 to take place.

10:18:30 15 And as a resident of the State of Arizona, BPV's
16 activities are clearly centered here and BPV is subject to the
17 laws of the State of Arizona.

18 THE COURT: Where do you think the law of New Jersey
19 and the law of Arizona are different that is relevant to the
10:18:53 20 issues we're addressing in this motion to compel?

21 MS. HELM: The law of the State of Arizona, as the
22 Court is already familiar with, has, I would use the term
23 broader approach to the attorney-client privilege, has
24 recognize a broader approach, although you have to strictly
10:19:12 25 construe it to the privilege, where New Jersey takes a more

10:19:17 1 limited approach to the privilege.

2 I read a case, albeit an old one from the '80s, that
3 basically said New Jersey has not yet addressed and the way
4 their law is set up doesn't really address the attorney-client
10:19:31 5 relationship in an in-house situation where you have a
6 combined communication that is in part privileged and in part
7 could be construed business. I think Arizona has looked at
8 that and has said we recognize in-house counsel, we recognize
9 communications in the corporate context on a broader basis
10:19:51 10 than New Jersey.

11 THE COURT: So of the specific issues where the
12 parties are in disagreement that have been briefed, where do
13 you think choice of law makes a difference?

14 MS. HELM: I think the plaintiffs take the
10:20:06 15 position -- I'll use an example they continue to raise, and
16 that is communications by a paralegal. They take the position
17 those are not recognized. We take the position that the
18 Arizona statute specifically addresses communi- -- I mean it
19 specifically talks about communications by a paralegal. So
10:20:21 20 that would be an example where I think it would make a
21 significant difference. Although I want to be careful,
22 because I believe the plaintiffs conflate and I don't want to
23 conflate work product and attorney/client privilege.

24 And a lot of -- not all of them, but a lot of the
10:20:37 25 communications from paralegals that are on the privilege log

10:20:40 1 are in, our position, they're in the work product context
2 because they're communications relating to events that
3 occurred because a lawsuit had been filed. But there are some
4 that are still at issue that aren't in that context.

10:21:08 5 THE COURT: What is your response to the question of
6 whether this will need to boil down to a
7 communication-by-communication choice of law determination?

8 MS. HELM: I think the Restatement addresses that and
9 says the Court should apply the law of the state with the most
10 substantial relationship or most substantial contact. I think
11 the communication -- if you follow the Restatement, you put
12 the umbrella of one state over -- state's law over the
13 communications, I think that's what the Court should do. I
14 think particularly in a situation where you're not just the
15 forum in an MDL, Arizona is the home state of the main named
16 defendant, the actor about whom actions are at issue in this
17 case. And so this is not just a situation in MDL where you
18 are the forum, you also have an Arizona resident as a
19 defendant, as the main defendant, in the lawsuit.

10:22:13 20 THE COURT: Okay. Did you have other points you
21 wanted to make?

22 MS. HELM: No, Your Honor. Thank you.

23 THE COURT: All right. Thanks.

24 Mr. Combs, any other thoughts?

10:22:23 25 MR. COMBS: Just to respond to a couple of Ms. Helm's

10:22:26 1 points, Your Honor.

2 Ms. Helm just admitted something we've said all along
3 is that Bard has always acted in reliance on New Jersey law.
4 And as she just said, it wasn't until briefing this issue to
10:22:41 5 the Court in March or April of this year where they started
6 looking at Arizona law. And that's one of the factors in the
7 Restatement on which law should apply is whether somebody had
8 relied on -- relied on a particular state's jurisdiction and
9 it would be unfair to apply another law.

10:23:02 10 THE COURT: Well, but isn't that reliance referring
11 to reliance at the time of the communication?

12 MR. COMBS: Correct, Your Honor. Yes. Reliance at
13 the time of the communication. Everybody was relying on New
14 Jersey law. That's what Ms. Helm --

10:23:17 15 THE COURT: You're saying in each of the
16 communications that are at issue, they're clearly relying on
17 New Jersey law?

18 MR. COMBS: Bard's legal department, when they're
19 acting -- conveying legal advice, the privilege law they're
10:23:33 20 relying is New Jersey law.

21 THE COURT: What's the basis for that assertion?

22 MR. COMBS: Because Ms. Helm just said, and we said
23 all along --

24 THE COURT: She's shaking her head, so I don't think
10:23:41 25 she agrees --

10:23:43 1 MR. COMBS: She can certainly rebut me.

2 THE COURT: Let's not cite her as the source. What

3 is your source for saying that the --

4 MR. COMBS: Bard did not --

10:23:50 5 THE COURT: -- Bard legal department --

6 MR. COMBS: Bard's privilege --

7 THE COURT: -- relies on New Jersey --

8 MR. COMBS: -- logs were constructed. Their

9 communications going back throughout this -- they never

10:23:58 10 discovered Arizona law until --

11 THE COURT: Those are all -- those are all post

12 communication communications. Those are after the privilege

13 log communications occurred in the context of this case.

14 MR. COMBS: Right. So how could they be saying they

10:24:11 15 relied on Arizona law in making these communications?

16 THE COURT: Well, no. I'm not sure we're talking

17 about the same thing.

18 It seems to me that when I am looking at reliance for

19 purposes of Section 139, the reliance I'm focusing on is not

10:24:27 20 your reliance or these attorneys' reliance in this litigation,

21 or even in the litigation that preceded the MDL. It's the

22 reliance of the lawyer and the person receiving the

23 communication that is at issue at the time the communication

24 occurred.

10:24:42 25 My question is what is your basis for saying that all

1 of those communications relied on New Jersey law?

2 MR. COMBS: Because they didn't even discover the
3 Arizona privilege law until March or April of this year --

4 THE COURT: These lawyers --

5 MR. COMBS: -- started briefing this issue.

6 THE COURT: -- may not have. What's your basis for
7 saying the in-house attorney in New Jersey who is writing to
8 the director in Arizona was relying on -- I should make the
9 assumption that they were relying on New Jersey law?

10 MR. COMBS: That's the presumption in the case law,
11 Your Honor, where New York corporations are advising on
12 privilege. We cited couple of those cases. And New York
13 corporations are presumed to have applied New Jersey law when
14 advising their clients about privilege and communicating
15 privilege.

16 THE COURT: Those cases, I think, say that if a
17 lawyer is communicating with a New York corporation, the
18 presumption is the lawyer is talking about New York law. I
19 think that's what the case says.

20 MR. COMBS: I think they're communicating with
21 people -- okay.

22 THE COURT: Am I wrong about that? I mean, I think
23 the -- let me pull up those cases that you cite.

24 It says, for example, in the *Compuware*,
25 C-O-M-P-U-W-A-R-E, *Corp* case, which is from Michigan, it holds

10:26:07 1 that a New York company's lawyers advising on privilege surely
2 relied on the protections of New York law.

3 Next case. Holding that attorneys for New York
4 corporate defendant probably would have consulted New York
10:26:23 5 law. So it's saying we're presuming they applied the law of
6 the state in which the corporation was based.

7 Bard Peripheral Vascular is an Arizona corporation
8 with headquarters in Arizona. So wouldn't these cases say I
9 should presume that the lawyers were applying Arizona law?

10:26:43 10 MR. COMBS: Well, the distinction is that's where the
11 lawyers are in those cases. I think we're looking at it two
12 different ways, Your Honor. But that's where the lawyers
13 were. I think that's a fair presumption. And I think --

14 THE COURT: Well, so are you saying --

10:26:57 15 MR. COMBS: I --

16 THE COURT: -- I should presume that when you're
17 advising an Idaho corporation, you're going to be advising
18 that corporation on the basis of Arizona law because you're
19 based in Phoenix?

10:27:09 20 MR. COMBS: I think that gets to my second point I
21 was going to make, Your Honor, is that this analogy of outside
22 counsel, you know, what Nelson Mullins might advise the client
23 doesn't fit the corporate context of a parent in a wholly
24 owned subsidiary where all their in-house lawyers, basically
10:27:24 25 the same corporation, are in New Jersey. That model doesn't

10:27:28 1 fit the outside counsel. And that would mean that Bard -- all
2 of Bard's lawyers were practicing Arizona law? I don't think
3 that's -- I don't think that's how it works. I don't think
4 that's how the Arizona bar would see it. These are New Jersey
10:27:43 5 lawyers advising a New Jersey corporation and communicating to
6 a New Jersey based corporation and its employees.

7 THE COURT: Well, you're asserting, then, I should
8 view Bard Peripheral Vascular as New Jersey based corporation?

9 MR. COMBS: Correct. Because that is where its
10 in-house counsel is located, that's where all its final
11 corporate decisions are made, and that's the real center of
12 the relationship.

13 THE COURT: Do you have any basis for disagreeing
14 with the defendants' assertion in Mr. Carr's affidavit that
10:28:22 15 all of the decisions regarding product design, product
16 testing, marketing, communications with the FDA, et cetera,
17 were based in Arizona?

18 MR. COMBS: I'm sure we can find examples in the
19 record if we conducted an exhaustive search where that's not
10:28:44 20 true, Your Honor, but I don't have a specific example to cite.

21 But I did want to just make one other point on
22 Ms. Helm's characterizations of, you know, this is actions --
23 it all involved actions in Arizona about Bard. This involved
24 actions in all 50 states. IVC filters were manufactured out
10:29:03 25 of state. Sales and marketing happened out of state. So to

10:29:06 1 centralize all this in Arizona is, I believe, incorrect, Your
2 Honor.

3 THE COURT: All right. Did you have other points you
4 wanted to make?

10:29:13 5 MR. COMBS: That's it for now, Your Honor.

6 THE COURT: All right. Thank you.

7 All right. I will take this issue under advisement.

8 Obviously, once I make the choice of law decision,
9 I've got to apply it to the 133 documents that are at issue in
10:29:28 10 this motion to compel. So this is not an order I'm going to
11 get out tomorrow.

12 But this additional briefing has been helpful.

13 MR. COMBS: Your Honor, if I may just correct you
14 slightly on that point. And Ms. Helms can correct me if I'm
10:29:43 15 wrong, but we did narrow it from 132 to maybe there were five
16 examples --

17 THE COURT: You're right. Five times the number of
18 issues. You're right.

19 MR. COMBS: Right. A little bit less onerous burden
10:29:58 20 for you.

21 THE COURT: Good point. Excellent point.

22 Let's talk about the other issues that are addressed
23 in your joint status report. And I'd like to start with ESI
24 discovery issues.

10:30:22 25 There is a matrix that you all provided at Docket

1756 that addresses a number of -- well, I shouldn't say a number. It addresses an issue regarding whether regional sales manager e-mail should be subject to discovery. You indicate in Docket 1756 that there are no other ESI discovery issues that I need to resolve. Is that still the case?

MR. STOLLER: Your Honor, at the moment there are not. We're obviously engaged in ongoing conversations about a number of issues relating to ESI. I think we laid out in our filing the plan, for lack of a better word, in terms of handling ESI, both on a go-forward basis and sort of as issues come up, and we've continued to do that. We're engaged in ongoing conversations.

There are issues that are percolating, and if they rise to the point of an actual dispute, our thought process is to, as we have in the past, file a matrix with the Court on those issues. But at present there's no issue that is ready to come before the Court. Other than what's already in the papers.

THE COURT: All right. That's fine.

I would request something of you. If issues come up and you do file a matrix, would you please call my office and tell us that you've filed a matrix.

We are watching what's coming in in this case, but as you've seen from the docket, sometimes we get 50 new docket entries a day. And I don't want to miss a matrix and

10:32:01 1 discover, as I did preparing for today's hearing, that one
2 came in two months ago that I didn't focus on at the time. So
3 just call us, tell us you filed a matrix, that will get my
4 attention on it sooner than the next status conference.

10:32:15 5 MR. STOLLER: Absolutely, Your Honor.

6 MR. NORTH: Your Honor, I was going to point out the
7 parties have now agreed upon 21 previous custodians whose
8 materials is being refreshed and 34 new custodians and that
9 process is well under way. We're producing those on a rolling
10:32:32 10 basis and the collection and processing is occurring.

11 THE COURT: Okay. Thank you.

12 Let's talk about the regional sales manager issue
13 that is addressed in the matrix that you all submitted.

14 The plaintiffs are of the view that these regional
10:32:46 15 sales managers are really national managers akin to assistant
16 vice presidents of sales.

17 The defendants make a number of assertions and I want
18 to ask you if you agree with them, Mr. Stoller.

19 The defendants assert that there is a separate sales
10:33:07 20 department that creates marketing materials, and that -- well,
21 I should say there's a marketing department that creates
22 materials separate from the sales department and that there is
23 ESI from the marketing department being searched.

24 That in addition to ESI from the marketing
10:33:33 25 department, you seek ESI from 11 people in the sales

10:33:39 1 department that are at the national level and not the regional
2 sales managers. So I think the assertion is there's this ESI
3 being produced from sales that writes all the marketing
4 materials, there's 11 people within the actual sales
10:33:57 5 department that are being searched now, and defendants'
6 position is let's get that done and then decide if the
7 regional sales managers are necessary, because you want nine
8 additional individuals to be searched as part of the regional
9 position.

10:34:13 10 Do you agree that that's an accurate description of
11 the search that's under way?

12 MR. STOLLER: May I approach the podium?

13 THE COURT: Yeah. Yeah.

14 MR. STOLLER: I'm going to agree and disagree, and
10:34:28 15 give you some context for this.

16 There is a separate marketing department. It is
17 headed by a separate person. From that marketing department,
18 my list indicates they are producing records from, I think,
19 seven people over a 14 year period.

10:34:51 20 The number of people that they have agreed to produce
21 records from, from the sales department, is, in addition to
22 the people, the three people who have served in the position
23 of vice president of sales, they are one, two, three, four,
24 five people.

10:35:11 25 To me, Your Honor, this isn't an issue of number of

10:35:14 1 people, it's positions. It's a 14 year time period we're
2 talking about with respect to both of these departments and
3 the people in them. And the way in which we went about
4 suggesting custodians for collections is we went to their org
10:35:30 5 charts and we said, what positions in their national org
6 charts are those that are most likely to have information
7 relating to IVC filters, and as it related to the national
8 sales practices of IVC filters what people in those org charts
9 are most likely going to have that type of information?

10:35:53 10 If I can approach, Your Honor, I have some copies of
11 those org charts I'd sort of like to walk through with you.

12 THE COURT: That's fine.

13 MR. STOLLER: What I have given you, Your Honor,
14 indirectly, is a series of individual pages from org charts
10:36:22 15 from the years 2004 through January of this year. There's
16 nothing for 2015, but it's my approximate for that year.

17 But at any rate, the point being is that this comes
18 from their org. These are their org charts. This is their
19 organizational structure for the sales department on an annual
10:36:44 20 basis.

21 I will tell you, because of the way, manner, in which
22 the documents were produced, they're not same month every
23 year. Some years they give us monthly, some years we just
24 have annual. For the first, I don't know, 2012, they're
10:36:58 25 middle of the year for the most part, June, July, August. We

10:37:02 1 could get them sometimes earlier, sometimes later. But the
2 idea is they're a snapshot in time of what's going on in the
3 sales department.

4 But let me start very simply with the very first one,
10:37:12 5 which is July 1 of 2004. And there you'll see the
6 organization of their sales department. At the very top is
7 Mr. DeJohn who was their vice president of sales. He had six
8 people who reported to him. One, if you look at the far left
9 side, is their regional sales manager for surgery. Not
10:37:33 10 somebody we would be concerned with.

11 Then we have two regional managers, east and west.
12 Mr. Cortelezzi and Mr. DeLeon, who are regional sales
13 managers. Those are two of the people we're talking about
14 here. Then you have Mr. Kumming, who was director of
10:37:49 15 professional development; Mr. Schmidt, director of national
16 accounts; and Ms. Everett who was the customer service
17 manager.

18 I'm going to use this as proxy and I'll show you some
19 other examples as we go through. But that's a generally
10:38:06 20 consistent structure of their org chart. Sometimes there's
21 more boxes under here, sometimes less.

22 What they have said to us in terms of going through
23 this, it's a number of people, whatever the number is I've
24 read you, but really what they said is we'll give you
10:38:18 25 Mr. DeJohn's position, the vice president of sales, and the

10:38:22 1 person who sits in Mr. Kummings position -- or Kummings
2 position, however you pronounce that name -- who apparently is
3 in this case director of professional development. In other
4 years, as we go through you can see it's the person in charge
10:38:35 5 of training.

6 Those are the two roles in each year they're willing
7 to give. What we've said is, look, we don't need, obviously,
8 people who have to do with surgery and we don't need the
9 customer service manager. But the people at the top of the
10:38:49 10 food chain who are dealing with the sales reps and the
11 regional people and interfacing with them and making those
12 decisions about what are the sales reps going to do nationally
13 are going to be the people who sit in those two positions.

14 Normally I would expect in an organizational --

10:39:06 15 THE COURT: What two positions?

16 MR. STOLLER: I'm sorry. The positions of the
17 regional managers. Here it's east and west.

18 Often you would expect to see, Your Honor, in these
19 kind of organizational charts somebody who held the position
10:39:20 20 of director of sales or something along those lines. In fact,
21 for one year, if you flip back, I think four pages from the
22 end, in December of 2013 they in fact have a director of
23 sales. Mr. Hans Yentz. It bears the Bates label in the
24 bottom corner of 4561. December of 2013. That's the one year
10:39:49 25 they have a director of sales.

10:39:51 1 But if you go to the very next page, you'll see, Your
2 Honor, who is reporting to him and that one year are these
3 regional managers. But in no other year is there somebody who
4 holds that role.

10:40:02 5 Effectively that position, the people who are making
6 the national decisions, according to their org charts, and the
7 ones dealing with sales reps, not training, not creating
8 materials, but making decisions about how the sales reps are
9 going to do things and the national communications are going
10:40:21 10 to be the people sitting in those two roles. In some years
11 it's three, Your Honor. This, we have an eastern and western.
12 Most years there's only two.

13 If you look at the second page of what I've given
14 you, this handout from 2005, you'll see there, and it's very
10:40:37 15 difficult to read and I apologize, this is the best I could do
16 with it, but you'll see that those two regional sales
17 managers, you'll see underneath them, that's the whole sales
18 force. And everybody in that sales force is reporting up to
19 those two positions.

10:40:52 20 And that's consistent, Your Honor, from year to year,
21 and you can see -- I'm not going to spend time going through
22 this year by year with you, but you can see as you make your
23 way through the org charts that what they've given us from
24 their sales department is the vice president of sales, to whom
10:41:08 25 everyone reports, and on an annual basis the person who is

10:41:11 1 responsible for the training or professional development. No
2 one who's dealing with the sales force.

3 That's why we think, despite the designation of these
4 positions as regional, they're national positions. Somebody's
10:41:28 5 got to be doing the job.

6 The number of names is whatever we've got on our
7 list, Your Honor. I believe it's nine. But that's a product
8 of time. It's just, again, year by year going through these
9 org charts and saying who holds those positions? And those
10:41:41 10 are the names we've asked for because those are the people who
11 are going to be responsible for dealing with the sales force.

12 We understood, Your Honor, when you directed us in
13 Case Management Order Number 8 to start with national sales
14 and marketing practices and not to go to regional. That is
10:41:58 15 not our goal here. Our goal is to identify and has been to
16 identify those folks involved in the national sales practices.
17 These org charts are the single best piece of evidence of
18 who's doing that. That there is not again in particular
19 somebody who is the national director of sales in any year but
10:42:15 20 one tells us that the people who are filling that role are
21 these people. There's nobody else on these charts who's
22 responsible for that sales force.

23 Unless you have any questions, I'll take a seat.

24 THE COURT: Okay. Thank you.

10:42:40 25 MR. NORTH: Your Honor, with due respect to

10:42:44 1 Mr. Stoller, I believe he is misconstruing the significance of
2 an organizational chart. The organizational charts
3 demonstrate lines of reporting. They do not demonstrate
4 positions of authority or decision making; only lines of
10:42:59 5 reporting. The plaintiffs are attempting to turn these
6 organization charts into somehow the creation of national
7 management boards, which they are not.

8 We have already -- and I would also note that the
9 exemplary organizational chart, the one on the top, is from
10:43:17 10 2004. And it's probably the most simplistic organizational
11 chart of all of them. Over the years, the department became
12 much more, in most years, larger; more people involved. And
13 we have already agreed to produce the ESI of multiple people
14 in the sales department at the national level.

10:43:39 15 We have agreed to produce the ESI of I believe three
16 different vice presidents or directors of sales over the
17 years. We have agreed to produce the ESI of the directors of
18 professional development, too, I believe. We agreed to
19 produce the ESI for the national sales training manager, two
10:44:01 20 different people that held that role, which they asked for.
21 We have agreed to produce the ESI of the director of sales
22 training and development at the national level.

23 We have agreed to anybody that has a national role in
24 the decision making and oversight and assistance of the sales
10:44:21 25 force in general.

10:44:22 1 What we're asking is we've already agreed to 34 new
2 custodians, we've already agreed to a refresh of 21, and we at
3 this point do it in a tiered process. Let's get through that,
4 let's let them look at that, and then see what they need
10:44:41 5 beyond that. But if we add nine more here, then we're up to
6 sixty-something. And then there are a number of others that
7 we're still discussing.

8 My concern is that this is becoming like an
9 avalanche, and I believe this is one place that we can at
10:44:55 10 least for now draw a line and say let's go through the
11 national discovery and all these sales trainers, development
12 people, vice president of sales at the national level, and
13 also the marketing people.

14 They're getting the ESI of several directors of
10:45:13 15 marketing over the years, the vice presidents of marketing,
16 the senior manager of marketing communications. In other
17 words, developing the marketing brochures, websites, things of
18 that nature for use by the sales department.

19 And all together, I don't have the exact number here
10:45:33 20 but there are probably between 15 and 20 custodians that had
21 been agreed upon in the national marketing department or
22 national sales department. And we would just ask that let's
23 get through that first and then make a decision as to whether
24 further ESI is needed from people who had responsibility for
10:45:55 25 managing sales representatives in the field on a regional

10:46:00 1 basis.

2 THE COURT: Okay. Thanks.

3 Mr. Stoller.

4 MR. STOLLER: Let me address two points. And I think
10:46:12 5 the org charts are instructive about what we're talking here.
6 Mr. North talked about we're giving them from this position,
7 that position and the other position. They're different names
8 for the same thing.

9 Every year for every org chart, every one of these
10:46:25 10 we've given you -- and I'll give you a couple examples.
11 Again, the first year, 2004, they're talking about the
12 position of the vice president of sales they're giving us.
13 There's three people who held that position. It's not a
14 product of people, it's the same position. It's a product of
10:46:41 15 time; right? This is a case that spans 14 years. They've had
16 turnover. Different people are going to have touched that
17 position.

18 With respect to their other position, whether it's
19 the development or training or whomever, it's effectively the
10:46:55 20 same position. If you go forward, say -- I'm just going to
21 pick something randomly -- 2006, two years ahead, which is the
22 fourth page in your exhibit. The positions they're talking
23 about are Mr. DeJohn again and Mr. Kuming. That's it for
24 that entire year.

10:47:10 25 If we skip ahead, let's go to 2009, which is -- I'm

10:47:18 1 not sure how many pages in. I'm randomly skipping through.
2 The position they're talking about producing documents from
3 there is Mr. Doherty, a new vice president of sales, and
4 Mr. Wilson, the senior manager of training and development.
10:47:31 5 It's one position. And that's consistent. We're now five
6 years in and it's no different.

7 If we go to 2012, a more complicated org chart,
8 there's now eight or nine people below Mr. Doherty, but the
9 positions they're talking about producing are the training
10:47:51 10 managers on the far right and their marketing director in the
11 middle. None of these people are dealing with the sales
12 force. And that's our point, Your Honor. No matter what you
13 call the position, they're not talking about producing
14 documents for people responsible for and dealing with the
10:48:07 15 sales forces. And the only people doing that on the national
16 level are the folks who hold the title "regional." Their
17 regions are half the country. I don't disagree when we've
18 tried to do things, frankly, in an incremental process on most
19 of this stuff, but there is nobody holding that role in terms
10:48:26 20 of dealing with the national sales forces here.

21 While Mr. North said these are only lines of
22 reporting, I don't necessarily disagree with that except for
23 the fact that people the who are responsible that they're
24 producing out of the sales department are not responsible for
10:48:38 25 that sales force. And that's the information we're trying to

10:48:40 1 get.

2 I understand the numbers. But it's a product of
3 their own turnover and 14 years.

4 THE COURT: Okay. I think I understand both sides'
10:48:48 5 positions.

6 MR. STOLLER: Thank you, Your Honor.

7 THE COURT: All right. Thank you.

8 Let's talk about the FDA warning letter issues. This
9 was filed at Docket 1471. I should have gotten you a decision
10:49:04 10 earlier on this but this was one of those that I wasn't aware
11 of until I started preparing for this hearing. We're going to
12 start internally making sure we pay closer attention to when
13 they come in, but, again, call us, if you would, when a matrix
14 is filed and that way I'll be able to focus on it.

10:49:27 15 This matrix focuses on communications that are
16 related to the FDA warning letter and Items 1, 2, and 4 in the
17 matrix seem to be essentially the same things. It's internal
18 communications.

19 I guess my first question is whether you've made any
10:49:46 20 progress on this since the matrix was filed.

21 MR. NORTH: Your Honor, that's why I stood up. I
22 think a lot of that is moot for the reason that the day before
23 we submitted this matrix the plaintiffs came back with a
24 proposal for 17 custodians and 11 of those 17 are on the list
10:50:02 25 that we've already agreed upon. There's kind of wrinkles with

10:50:08 1 some of the other six, but I believe on that issue perhaps
2 Mr. Stoller and I need to talk about the six because just as a
3 part of the regular ESI discussions, 11 of those are included.
4 And this is a running dialogue Mr. Stoller and I have had, I
10:50:22 5 think in a productive fashion, which was the defendants really
6 thought it necessary to identify ESI custodians on a global
7 basis, as opposed to finding people on various specific
8 sub-issues, and I think we've done that here effectively by
9 agreeing on 11 of the 17, and I would suggest we confer on the
10:50:42 10 remaining six.

11 MR. STOLLER: That's correct, Your Honor. This is
12 one of the wait-and-see approaches where we said, all right,
13 we'll take what you give us first, see what we get there, then
14 move on and see if we need the others.

10:50:53 15 THE COURT: Okay. So is it correct that I do not
16 need to rule on Items 1, 2, 4 of the matrix?

17 MR. STOLLER: I don't have the matrix in front of me,
18 Your Honor. If you tell me what those are, I can confirm -- I
19 believe most of everything in the matrix has been mooted by --

10:51:09 20 THE COURT: Item 1 is Request Number 7, which is all
21 internal communications relating to the subject matter of the
22 warning letter.

23 Item 2 is Request Number 8. These are in the notices
24 of deposition. And it's communications with the FDA and
10:51:27 25 internally since issuance of the warning letter related to the

10:51:32 1 contents of the warning letter.

2 And the fourth item is request for production 35,
3 which is all internal communications of Bard employees related
4 to the FDA's inspection, the 483s, the warning letter.

10:51:50 5 Including retrospective views of reporting.

6 MR. STOLLER: I believe, Your Honor, as Mr. North
7 indicated, those are part of our ongoing discussion and
8 they've agreed to produce certain information materials, we'll
9 receive that and then have further discussion.

10:52:06 10 THE COURT: Mr. Lopez.

11 MR. LOPEZ: Yes, Your Honor. This might be a good
12 point to bring up something that deals with the warning letter
13 and maybe even a broader discovery, that is TrackWise database
14 that I understand is ready for production. But the point is
10:52:21 15 the TrackWise database is where Bard would have now reported
16 the way the warning letter suggests they should have reported
17 certain of those MDR's. We want to make sure that we have
18 that which was reported to FDA the way the FDA said it should
19 have been reported, and that would be in this database that
10:52:44 20 needs to be updated that we haven't had. It was suppose to be
21 produced last Friday. I just want to make sure it's being
22 produced.

23 THE COURT: Is there an issue you need to address
24 with me, or is this a discussion you should be having with
10:52:56 25 Mr. North?

10:52:58 1 MR. LOPEZ: It's a discussion we've had with
2 Mr. North. I understand it's going to be produced tomorrow.

3 MR. NORTH: It's a discussion Mr. Boatman and I have
4 had, been having, frequently about technical glitch between
10:53:07 5 the vendor and the division and downloading some stuff.
6 Mr. Lopez must not have been privy to that.

7 MR. LOPEZ: I was. The issue, because you brought it
8 up with the warning letter, I just want to make sure what
9 we're getting in the database will include all of the updated
10:53:20 10 reporting that needs to be done --

11 THE COURT: That sounds, Mr. Lopez, like a question
12 you shouldn't be asking me, but you should be asking defense
13 counsel.

14 MR. LOPEZ: I understand.

10:53:30 15 THE COURT: If there's a disagreement, I'll be happy
16 to address it.

17 MR. LOPEZ: I bring it up because it's part of your
18 order that hasn't come out yet with respect to the warning
19 letter. I would like that to be addressed as well. I will
10:53:41 20 address it with Mr. North to make sure that's included --

21 THE COURT: I don't intend in my order to address
22 anything that's not in dispute. If you're still talking
23 about, keep talking about it. If you reach an impasse -- and
24 incidentally, if you reach an impasse on a specific issue, you
10:53:55 25 don't have to file a matrix. You can call and just ask for a

10:53:58 1 conference call. And if I can't take the call there, I will
2 within a day or two and we can talk through it. So if that
3 becomes an issue, absolutely you can bring it to my attention.

4 MR. LOPEZ: I didn't want to be remiss in not
10:54:09 5 bringing it up today.

6 THE COURT: That's all right. That's been flagged.

7 So I'm not going to rule on the first, second, or
8 fourth items in the matrix.

9 The third item in this the matrix was the employment
10:54:21 10 files of four employees. Is that still an issue in dispute?

11 MR. STOLLER: I think it is.

12 THE COURT: I see Mr. North nodding.

13 Let me tell you my understanding what the dispute is
14 and then hear your comments.

10:54:36 15 This concerns the plaintiffs' request for the
16 complete employment files for employees Modra, M-O-D-R-A,
17 Uebelocker, U-E-B-E-L-O-C-K-E-R, Wheeler, and Ludwig.
18 Plaintiffs assert Mr. Modra was in charge of quality assurance
19 during the period of alleged underreporting or nonreporting
10:55:11 20 raised by the FDA and that these other three individuals
21 reported to him. And plaintiffs assert that discipline of
22 these employees -- reprimands, demotions other kinds of
23 discipline -- would be relevant to this issue.

24 The defendants assert that there are privacy
10:55:30 25 concerns. They cite cases about employment files. They

10:55:35 1 assert there would be a burden in producing them, which isn't
2 described, and I'm not sure I understand what the burden is.
3 I assume these are fairly discrete employment files.

4 Let me give you my initial reaction and get your
10:55:49 5 thoughts.

6 I do agree that if an employee was disciplined
7 because of something the FDA found to be a problem, it could
8 be relevant to the case. But employee files contain far more
9 than disciplinary actions, and so I'm not understanding why
10:56:11 10 complete employee files need to be produced because that -- 95
11 percent of that could be unrelated to disciplinary actions, if
12 there's anything disciplinary in them.

13 On the other hand, as I've already indicated,
14 defendants assert burdensomeness, but I don't know how
10:56:27 15 burdensome it is to pull an employee's file from the HR
16 department and produce it. And defendants assert privacy
17 concerns, but we have a protective order in place.

18 So those are my issues going both directions. My
19 inclination is to conclude disciplinary information could be
10:56:45 20 relevant, but I'm hard pressed to see what else is relevant in
21 those files. So I'm interested in your thoughts.

22 MR. NORTH: Your Honor, we would be willing to look
23 for disciplinary action related to the FDA reporting and
24 warning and certainly produce all of that. It's my
10:57:02 25 understanding there is no such thing, but I will certainly

10:57:05 1 confirm that. And if there is such a thing, if I'm mistaken,
2 produce that.

3 As far as the burden goes, Your Honor, these do
4 contain a lot of very personal information: salary, health
10:57:18 5 issues, things like that. And even if we have a protective
6 order in place, I believe there would be a need to do some
7 extensive redaction of things like that that are clearly
8 irrelevant and clearly very personal to these individuals.

9 And as far as the second part of the burden goes,
10:57:35 10 you're right, for four it's not hard. But down the line, if
11 we start doing this on a frequent basis it does become quite a
12 burden.

13 MR. STOLLER: Your Honor, might I approach?

14 THE COURT: Sure.

10:57:51 15 MR. STOLLER: The -- let me start with the following,
16 which is that we were told to pound sand on these, so I don't
17 have a feel for what's in their employment files. I have a
18 general feel for what's in the employment files and there's
19 obviously a lot of personal information and information we're
10:58:07 20 not going to need.

21 In terms of the stuff beyond -- my concern is the
22 term "discipline." That can have -- can be interpreted in
23 different ways. Some employers do annual reviews and you
24 might get downgraded and that might reference -- "downgraded"
10:58:24 25 might not even be the right term, depending upon the company,

10:58:26 1 but I think you understand my meaning. There may be
2 references to poor performance, particularly when you have an
3 issue of this magnitude where people weren't doing their job
4 and doing things correctly. They may not have been strictly
10:58:39 5 disciplined, but there may be references in those things to
6 downgrade to, whether it's a negative performance review or
7 change in -- it may not be strictly construed as disciplinary
8 action, but maybe a job reassignment. Those sorts of things.

9 There's also potentially in there issues relating to
10:58:59 10 the qualifications of the employees who are doing these roles,
11 performing these roles. Those sorts of things we would expect
12 to be in there.

13 It seems to me the logical way to proceed is for
14 defendants to give us a general description of what's in the
10:59:13 15 employee files for each of these four discrete employees, and
16 we can talk about what makes sense for them to produce and
17 what makes sense for them not to produce given the Court's
18 guidance that you believe some of the information in there is
19 relevant and discoverable.

10:59:28 20 I think with that guidance, they now have an
21 understanding they need to produce stuff, we can probably sit
22 down and talk through what's in those. And if there are
23 redaction issues that need to be addressed, discuss those
24 through counsel. But I think the starting point of these are
10:59:43 25 discoverable to some degree as an important step in resolving

10:59:47 1 the dispute.

2 THE COURT: Okay. I understand both parties'
3 positions.

4 What I will include in the order that comes out after
10:59:54 5 this hearing is the following resolution: I'm going to
6 require defendants to produce under the protective order
7 documents from these four employment files relating to any
8 internal discipline, reprimands, adverse consequences,
9 negative employment reviews, or comparable information based
11:00:15 10 on the underreporting or nonreporting addressed in the FDA
11 letter. And I think that targets exactly the most relevant
12 information.

13 If after you receive it, Mr. Stoller, you conclude
14 there may be more that's relevant, talk through it with
11:00:30 15 defendants and raise it with me.

16 Certainly as to qualifications, I'm assuming that's
17 thoroughly covered in the depositions of these four
18 individuals. So I don't think the disclosure of the
19 employment files generally are warranted for that basis.

11:00:44 20 So that will be my resolution of this issue.

21 The fifth issue that is raised in the matrix concerns
22 the request for the files of employees Ring, R-I-N-G,
23 Williamson, and Gaede, G-A-E-D-E.

24 These are higher level executives who received the
11:01:05 25 FDA communications and signed the company's responses to the

11:01:11 1 communications. Is this still at issue between the parties?

2 MR. NORTH: I would say in part, Your Honor.

3 We have already agreed as a part of the overall ESI
4 custodian discussions to produce the ESI from Mr. Williamson
11:01:27 5 and Mr. Gaede. I believe they're on the list. We've been in
6 discussions about Mr. Ring. He's been previously produced in
7 the litigation. There's some question -- we're talking about
8 a protocol for a refresh on him because of the number of
9 privileged documents. But as far as ESI goes, I believe the
11:01:46 10 issue is moot.

11 But they have phrased this term in the broad wording
12 of "files" without definition. We're certainly handling the
13 ESI, but we object to this broad and sort of undefined request
14 for, quote, files, unquote, without some specification in
11:02:05 15 discussion with us as to what they're looking for.

16 THE COURT: Defense counsel. I'm sorry. Plaintiffs'
17 counsel.

18 MR. STOLLER: Thank you, Your Honor.

19 I think that's something we can figure out amongst
11:02:17 20 ourselves. That's news to me. But we can certainly be
21 more --

22 THE COURT: Well, it's in the matrix. I mean the
23 ambiguity of "files."

24 MR. STOLLER: I guess my point is I didn't understand
11:02:29 25 it to be something beyond -- and I think our response is

11:02:32 1 fairly clear on this and I'm happy to have further discussion
2 with them on it, but obviously if Mr. Ring has in his office,
3 like I have in my office, a file that relates to this and says
4 "FDA warning letter," we would expect that to be produced.

11:02:46 5 I don't think this is a difficult or in any way
6 overbroad request. I think it's fairly straightforward. We
7 identified the individuals whose files we seek. I don't think
8 their lives are any different than mine, which is if they've
9 got files of their own that relate to those issues, we should
11:03:07 10 be entitled to them. It's not that different than the ESI
11 we're getting. One happens to be on the computer, one happens
12 to be in a desk drawer.

13 THE COURT: Well, I thought when you started your
14 comment on that, Mr. Stoller, you were going to say I don't
11:03:22 15 need to make ruling. But at the end, it sounds like you're of
16 the view I should rule on your request for the files of these
17 three individuals.

18 MR. STOLLER: My point is I don't -- I don't -- I'm
19 not quite understanding their position why they think it's
11:03:36 20 ambiguous at all. I don't think it's ambiguous. If we have a
21 dispute over what I've just said, perhaps you need to rule,
22 but I don't think there should be a dispute over that.

23 THE COURT: All right. I understand.

24 My conclusion on this issue is that the ESI related
11:03:53 25 to the FDA warning letters I think is relevant. Granted these

11:03:57 1 individuals may have been high-level persons, but if they
2 received ESI that's related to the FDA warning letters, I
3 think that's relevant for the plaintiffs to discover.

4 I'm also of the view "files" is ambiguous. To say
11:04:13 5 you want the files related to the warning letter, I think it
6 needs to be more specific than that. If there are specific
7 categories of documents that you think you should get from
8 these individuals in addition to ESI, then by all means be
9 precise, raise them with defense, and if there's a
11:04:29 10 disagreement I'll rule, but "files," to me, is a very general
11 term and I can understand why defendants would have a
12 difficulty determining what is or is not in the, quote, files
13 of a vice president that has two or three assistants and lots
14 of computers among the assistants and other things that could
11:04:45 15 be included or not included.

16 MR. STOLLER: Happy to work on that, Your Honor. My
17 question to you is, because what seems self-evident to me is
18 clearly not self-evident to you or defense counsel, so in
19 terms of specificity what are you looking at from plaintiffs
11:05:03 20 in terms of --

21 THE COURT: I'm confident you can come up with a more
22 specific request, Mr. Stoller.

23 Okay. Let's talk about the deposition protocol for a
24 minute that you all submitted. I want to make sure I
11:05:31 25 understand a couple of issues on it. This is the protocol

11:05:40 1 that was filed at Docket 1472.

2 My understanding of paragraph H3 is that when you're
3 deposing former Bard employees, the agreement is that
4 plaintiffs get six hours and defendants get two, unless
11:06:12 5 there's an agreement between the parties for more. Is that a
6 correct reading of the paragraph? It wasn't entirely clear to
7 me.

8 MR. STOLLER: It is.

9 MR. NORTH: And they've been proceeding well, I
11:06:25 10 think, Your Honor, with that.

11 THE COURT: Okay. When you say for paragraph 4, "For
12 all other fact witnesses, both sides shall have equal time,"
13 do you mean three and a half hours, assuming you're going to
14 take a full deposition? Or is that something you're working
11:06:38 15 out?

16 MR. STOLLER: The short answer is it's both. We're
17 working it out and it is sort of a presumption. If we go a
18 full day and it's seven hours, then we'll go three and a half,
19 three and a half, in terms of division. But, frankly, the
11:06:50 20 depositions have been working out such that we cooperate. If
21 we need to go longer, there's discussion. But I don't think
22 we've even had that discussion yet.

23 The idea behind it was, look, if we think one side
24 ends up needing four hours and everybody's agreeing, including
11:07:05 25 the witness, then the other side would get four hours. But

11:07:08 1 it's been -- we've worked through everything thus far and --
2 the anticipation was we just wanted to be fair with
3 third-party witnesses.

4 MR. NORTH: That actually happened with the
11:07:15 5 deposition of Kay Fuller, Your Honor. It became clear -- we
6 were splitting that three and a half hours each, and it became
7 clear we needed a little extra time on both sides and with the
8 permission of Ms. Fuller's attorney I think we added one
9 additional hour. But the parties worked that out.

11:07:32 10 THE COURT: Okay.

11 In paragraph I, you state each party not present or
12 represented at a deposition can request permission to conduct
13 a supplemental deposition. My question is does that even
14 apply if the party had notice of the deposition and chose not
11:07:48 15 to attend? Or is this only parties who didn't have notice
16 because they weren't in the case yet?

17 MR. STOLLER: It's the latter, Your Honor. That was
18 the intention, was the people who aren't parties could come in
19 after the fact and say, look, I didn't have an opportunity to
11:08:05 20 participate in the deposition, and upon a showing, then take a
21 supplemental deposition.

22 THE COURT: It seems to me, to be clear of that, and
23 I just don't want a rush at the end where people are trying to
24 do additional questioning of witnesses who were deposed while
11:08:21 25 they were in the case, we ought to be a little more specific

11:08:23 1 and say each party not present or represented at a deposition
2 because they were not part of the case at the time may seek to
3 reopen. And that would, of course, include the parenthetical
4 that follows about parties added afterwards.

11:08:38 5 Does anybody see a problem with that clarification?

6 MR. STOLLER: Could you give your suggested language
7 again?

8 THE COURT: It would say something like: Each party
9 not present or represented at a deposition because they were
11:08:49 10 not a party in the litigation at the time of the deposition
11 may seek to reopen it later.

12 If that's the intent, I think --

13 MR. STOLLER: That sounds fine to us, Your Honor.

14 MR. NORTH: That sounds fine, Your Honor.

11:09:04 15 THE COURT: Okay.

16 There's a small typo in that paragraph that I'll
17 change as well when we do that.

18 Those were my only questions. Sounds like
19 depositions are proceeding well. So I'll go ahead and get the
11:09:14 20 protocol filed with that clarification.

21 You all raised in your joint report a question about
22 confidentiality designations. I understand these to be
23 documents the defendants are designating as confidential under
24 the protective order and plaintiffs want a method for, as I
11:09:41 25 understand it, challenging and getting a ruling on the

11:09:44 1 propriety of the confidential claim now. Defendants are
2 saying that is premature, it will really only become relevant
3 when evidence is submitted in summary judgment or for trial
4 and there will be different standards that apply at that
11:10:00 5 point.

6 And I guess the questions I have is -- are the
7 following: Is this a problem now? Is it creating
8 difficulties in the litigation that the plaintiffs don't
9 currently have a procedure for challenging? And if it is,
11:10:19 10 what's your proposal as to how we resolve it?

11 MR. BOATMAN: Your Honor, Ms. Matarazzo is going to
12 be addressing that on behalf of the plaintiffs. She's been
13 handling that for us.

14 THE COURT: That's fine.

11:10:37 15 MS. MATARAZZO: There is actually a procedure for
16 challenging it. It's laid out in paragraph 22 of the
17 protective order. And it involved us providing in writing our
18 challenge to any document being marked confidential, and then
19 within 10 days the party that marked the document has to
11:10:52 20 initiate a meet and confer. And then at some point, if the
21 parties reach an impasse, within 30 days of the party that's
22 challenging the confidentiality, that party provides a written
23 notice that the impasse has been reached and then the
24 designating party has to file a motion with the court. So
11:11:11 25 that's the procedure laid out in paragraph 22.

11:11:14 1 We've been going through that process with documents
2 that were marked confidential following -- with exhibits
3 following the depositions of two Bard employees. We now have,
4 I believe, six letters laying out confidential designations of
11:11:34 5 exhibits from six different depositions. We're up to 96
6 designations of exhibits at this point. And I guess we're
7 seeking the Court's guidance today as to whether or not the
8 Court wants to address that now or address that under
9 paragraph 22 or whether the Court would prefer to address that
11:11:54 10 at the time that we're dealing with dispositive motions.

11 We did have an issue, I believe, with the privilege
12 log motion where we had a document that we wanted to include
13 but we would have then to have made arrangements to file it
14 under seal and follow the procedures under paragraph 25 of the
11:12:10 15 protective order, so we chose not to file it.

16 We anticipate that a lot of these documents are going
17 to be exhibits to dispositive motions, and we anticipate a lot
18 of dispositive motions. So we're really just trying to gauge
19 the Court's preference. Does the Court want to deal with the
11:12:24 20 motion now or deal with the motion at the time that the
21 Court's dealing with all of the dispositive motions?

22 THE COURT: Well, let me ask you this question: As
23 I'm sure you know, under Ninth Circuit law there's a different
24 standard for design- -- well, protective order based on just
11:12:42 25 its production in discovery and a protective order for

11:12:44 1 confidentiality if it's going to be used for dispositive
2 motion, and there's a higher standard in order to keep it
3 confidential at the dispositive motion stage. There has to be
4 some compelling reason to keep it confidential.

11:13:02 5 My initial reaction, and I'm inviting your
6 disagreement with this if you think it's creating a problem,
7 is that if the primary concern is what will be filed at the
8 time of dispositive motions, we ought to postpone it until
9 then for two reasons: One is I shouldn't, and you shouldn't,
11:13:18 10 be spending time on documents now that ultimately may not
11 prove to be all that relevant to a dispositive motion. And,
12 secondly, that compelling reason standard I think is better
13 applied in the context of a motion where I understand what the
14 issues are.

11:13:34 15 And the whole reason behind the Ninth Circuit
16 standard is what does the public need to know to understand
17 the Court's ruling. Well, to make that decision, I think I
18 need to have a better sense of what the issues are in the
19 motion and how central this particular document might be to a
11:13:49 20 ruling I make.

21 So my instinct would be to say let's deal with that
22 where it's really going to matter, at dispositive motions
23 stage. But if it's creating problems now, I don't want it to.

24 So I'm interested in your thoughts.

11:14:06 25 MS. MATARAZZO: No, at this point it's not -- I

11:14:08 1 wouldn't -- you guys can speak to that a little more than I
2 could. I wouldn't say it's creating large problems at this
3 point.

4 We have gone through -- there were 50 some odd
11:14:16 5 documents that were marked coming out of those two
6 depositions. We've narrowed them down to -- we've disagreed
7 with the vast majority. Not all, but the vast majority of the
8 designations.

9 We have gone through and narrowed that to the 26 we
11:14:28 10 think will likely -- has the potential to be involved in
11 dispositive motions practice and we believe that that good
12 cause standard, that lower standard can't be met. It's not --
13 it's not -- it's still not a low bar because there's a strong
14 presumption in the Ninth Circuit in favor of access for the
11:14:49 15 public to those documents should they be filed. So to the
16 extent the Court wanted to address it early, we believe it
17 wouldn't then have to be addressed later on. But, really, we
18 leave it to the Court's discretion to decide because the
19 Court's the one who's going to have to decide all these
11:15:04 20 motions at once.

21 THE COURT: Right. I think we should do it later.
22 But let me tell you something I intend to do when we get to
23 the dispositive motion stage. I intend to have what I will
24 call a pre-motion conference. The way I'm going to do that is
11:15:21 25 I'm going to require each side that is planning to file a

11:15:25 1 dispositive motion to provide the other side with a two-page
2 letter description of what the motion will be, and have the
3 other side provide a two-page letter description of the
4 response, on every motion that's going to be filed. And then
11:15:35 5 you're going to give me those letters, I'm going to read them,
6 and we'll talk about how we brief dispositive motions, what
7 statements of fact are needed, to try to really focus things.

8 I have found that parties in dispositive motions
9 often brief lots of issues that don't really need to be
11:15:54 10 briefed because they don't know ahead of time what the other
11 side will or will not be contesting. The idea is to focus us
12 on the issues that will be addressed. But at the same time
13 we'll be talking about evidence. And if at that point you say
14 to me, look, we've got 90 documents we want you to consider,
11:16:10 15 let's set up a procedure to get that resolved before we file
16 the motions, or in connection with it. We can figure out the
17 most efficient way to do it.

18 So it won't be a situation where you've had no
19 guidance whatsoever before you actually file your motions for
11:16:29 20 summary judgment, or similar motions.

21 MS. MATARAZZO: Thank you.

22 THE COURT: Anything from defendants? Okay.

23 We will deal with that issue.

24 Let me say again, though, if a confidentiality
11:16:44 25 designation becomes a problem in discovery, by all means call

11:16:49 1 me and we'll address that so it doesn't interfere with
2 discovery.

3 MS. MATARAZZO: Thank you, Your Honor.

4 THE COURT: There was a note in your joint report
11:16:59 5 that you wanted to discuss some modification to the bellwether
6 selection procedure.

7 MR. STOLLER: It was more a placeholder in case we
8 needed to, Your Honor. There was some delay on the side of
9 the plaintiffs as a whole of getting all of the profile forms
11:17:16 10 to the defendants by our original due date. They hustled and
11 have gotten most, if not all, of theirs done.

12 Mr. North and I spoke this morning. His numbers are
13 a bit different than mine, but I'll go back and confirm. I
14 think we're both in agreement that everything should be fine.
11:17:32 15 If something different happens and I conclude for some reason
16 we don't have what Mr. North has told us that's come in, I'll
17 confer with him again, and if we need to make some
18 modifications we'll get on the phone with the Court. But I
19 don't think either side at this point anticipates making any
11:17:47 20 changes.

21 THE COURT: Okay.

22 MR. NORTH: Agreed, Your Honor.

23 THE COURT: Okay. In Case Management Order Number
24 10, I had asked you to give me an update today on where the
11:18:02 25 ten mature cases stand and when you're anticipating we'll be

11:18:08 1 at a point of remand. I didn't see that addressed in the
2 joint report. Are you able to give me an oral report on where
3 those ten cases stand and what we ought to be planning for
4 them?

11:18:20 5 MR. NORTH: Your Honor, I raised this issue with
6 Mr. Boatman about two or three weeks ago and he said that he
7 needed to talk to the various attorneys involved in those
8 cases.

9 My biggest concern is that we come to some sort of
11:18:31 10 agreement because the chart we gave the Court earlier
11 indicates there are little bits of discovery, case-specific
12 discovery, that still need to be accomplished in those, and I
13 thought Mr. Boatman and I need to have a discussion as to
14 whether that fact specific discovery should proceed now or
11:18:48 15 upon remand.

16 THE COURT: Mr. Boatman, what is -- or Mr. Lopez,
17 what are your thoughts on this?

18 Could you pull the mic over, Mr. Lopez.

19 MR. LOPEZ: Mr. Boatman and I have been conferring
11:19:03 20 with this, and he's been the one discussing it with Mr. North.

21 I think the issue has always been how much of the
22 warning letter and the Kay Fuller issue can be used to
23 supplement either discovery in those cases or expert reports.
24 We still -- I think once we get to that point, we can probably
11:19:20 25 meet and confer, and I'm thinking all of these cases can be

1 submitted to Your Honor to be remanded.

2 So we still have depositions that are pending that
3 are -- where that issue of the warning letter and the
4 Kay Fuller issue are still relevant. It comes up in virtually
5 every deposition now. So if we can just defer this, Your
6 Honor, to the next CMC, we can give the Court a more detailed
7 report on where we are with respect to that discovery.

8 I will say this: That in speaking with some of the
9 lawyers, some of them are going to say that they want their
10 case remanded maybe after one more deposition. So they may
11 not be like all ten are ready to go. It could be -- because,
12 as Mr. North indicated, some of these are farther along than
13 others. There's some where we're at motions in limine. But
14 we're not quite there yet in getting the lawyers who have
15 these cases to say, yes, I'm ready to remand. But I suspect
16 by the next CMC we may have three or four that may be ready to
17 say that.

18 THE COURT: Okay. Then I'll include in the order
19 after today that you'll address that in the joint report to be
20 provided before the next case management conference. And
21 specifically when you think they'll be ready for remand.

22 We have a discovery cutoff deadline for fact
23 discovery of October 28th. I saw in your joint report the
24 list of depositions that have been taken and that are
25 scheduled through August 20th. I raised at the last status

11:20:59 1 conference whether we need to do any special deposition
2 scheduling to make sure we get it all done by October 28th,
3 such as blocking out weeks or double tracking or anything such
4 as that. I guess my question to you is the same: Are you
11:21:15 5 feeling all right with the pace we're proceeding and the
6 October 28th deadline or do we need to be thinking some
7 special scheduling to get things done by then?

8 MR. STOLLER: On behalf of plaintiffs, Your Honor, we
9 think we're on pace. I think if we get to a point where we're
11:21:28 10 going to have -- we think there's a problem, if the parties
11 can't work it out we'll get on the phone with you. But at the
12 moment we're definitely on pace.

13 THE COURT: Okay.

14 MR. NORTH: I agree, Your Honor.

11:21:38 15 THE COURT: Okay.

16 All right. Other than scheduling the next status
17 conference, those are the only issues I noted that we need to
18 address.

19 Do the plaintiffs have other matters you all want to
11:21:55 20 raise?

21 MR. LOPEZ: Well, I think we still have the Simon --
22 I may be wrong about this. Has --

23 MR. NORTH: We worked that out.

24 MR. LOPEZ: Simon Nitinol. Okay. Wanted to make
11:22:08 25 sure.

11:22:09 1 THE COURT: Anything else, Mr. Lopez?

2 MR. LOPEZ: No, Your Honor.

3 THE COURT: Mr. North.

4 MR. NORTH: Your Honor, the only thing is there has
11:22:15 5 recently been filed in this court a medical monitoring class
6 action. It was assigned to Your Honor, but I don't believe
7 it's technically been made a part of the MDL. And, of course,
8 you don't do a tag-along to the JPML when it's filed in the
9 court where the MDL is already pending.

11:22:32 10 It seems to me, and I believe the plaintiffs, I've
11 had some correspondence with the people on the plaintiffs'
12 camp handling that, that it ought to be brought in under the
13 umbrella of this MDL. Right now it's standing, as I
14 understand it, as a separate case. I think the Court's
11:22:47 15 typical case management order issued about a week ago
16 requiring filings and perhaps even a conference in August.
17 And if Your Honor is willing, it seems to me this ought to be
18 just brought in under the umbrella of this MDL and then we can
19 discuss at the appropriate time any separate scheduling for
11:23:07 20 that.

21 MR. LOPEZ: We're fine with that, Your Honor. Our
22 anticipation was that that was exactly what was going to
23 happen when we filed it, that ultimately it would come under
24 the umbrella of this MDL.

11:23:24 25 THE COURT: I haven't seen this case yet. Is this

11:23:25 1 counsel who are part of the plaintiffs' steering committee
2 that have filed it?

3 MR. LOPEZ: Yes, Your Honor.

4 THE COURT: Anybody know the case number?

11:23:34 5 MR. NORTH: I can promptly find it --

6 THE COURT: Actually, Traci found it. 16-1374.

7 *Barraza versus Bard.*

8 Is that right, *Barraza versus Bard*?

9 MR. NORTH: Yes.

11:23:52 10 THE COURT: When you say bring it in under the
11 umbrella of the MDL, are you suggesting that I just enter a
12 standard order consolidating cases like I can in any civil
13 case and consolidate it with the MDL? Is that the procedure
14 you think ought to be followed?

11:24:12 15 MR. LOPEZ: Speaking on behalf of the plaintiffs,
16 yes, Your Honor. Coordinating discovery and whatever happens
17 to that case will happen here.

18 THE COURT: Is this a nationwide class action?

19 MR. LOPEZ: It is, but involves, I think, 13 states.

11:24:31 20 THE COURT: Meaning you have named plaintiffs --

21 MR. LOPEZ: We have named plaintiff --

22 THE COURT: -- 13 states? But is the class defined
23 as nationwide or just those 13 --

24 MR. LOPEZ: Just those 13 states. Please don't ask
11:24:48 25 me to name them all.

11:24:54 1 THE COURT: So are you lead counsel, Mr. Lopez?

2 MR. LOPEZ: I and counsel from Lief Cabraser firm
3 are on the complaint, but it is going to be a PSC undertaking.

4 THE COURT: Okay. So you are authorized, I take it,
11:25:12 5 to stipulate on the record that that be consolidated with the
6 MDL?

7 MR. LOPEZ: Yes, Your Honor.

8 THE COURT: And I'm assuming it's the same defendants
9 named, Mr. North?

11:25:21 10 MR. NORTH: Yes, Your Honor, we would agree to that.

11 THE COURT: All right. I will look at that file.

12 I guess a question I have is it sounds like what my
13 staff did is what we do in all civil cases, to get a case
14 management conference scheduled. Do we need to have a case
11:25:42 15 management conference with respect to that class action or
16 does it simply get blended into the case management orders
17 that we have already entered in this case? And if it's the
18 latter, do we need a date for a motion to certify the class?
19 Do we need any class-specific procedures that need to be
11:26:08 20 adopted?

21 MR. NORTH: It would seem to me, Your Honor, the
22 discovery that's ongoing on the merits in the MDL would
23 probably have application to the class action, so there would
24 not be a need for a specific case management order at this
11:26:23 25 point. But down the line as we go further along on that

11:26:27 1 discovery, it would probably be appropriate at that point to
2 get a separate order with a class certification schedule.

3 THE COURT: What do plaintiffs think?

4 MR. LOPEZ: I would say this, Your Honor. From a
11:26:42 5 discovery standpoint we would not ask the Court to have -- to
6 give us a different discovery track. I think the depositions
7 that we've got scheduled we will address issues relevant to
8 the medical monitoring. We may ask for one or two additional
9 depositions that are specific to the medical monitoring class.

11:27:00 10 I would guess no more than that. But as Mr. North said, I
11 think there's going to be a different -- we're going to have
12 to find someplace in the schedule that we have for the
13 underlying cases how we deal with certification and things
14 like that. Experts. It will be a different -- potentially
11:27:24 15 different group of experts, too.

16 THE COURT: Well, that's what I was about to ask
17 about. Under Case Management Order 8 for the MDL we've got an
18 October 28th deadline for fact discovery, December 16th
19 deadline for plaintiffs' expert disclosures, February 3rd for
11:27:40 20 defense experts, March 3rd for rebuttal experts, May 19th for
21 the close of expert depositions. And then, of course, we have
22 the bellwether selection process that's laid over that.

23 On those discovery dates, the fact and expert dates,
24 are those workable for the class action?

11:28:02 25 MR. LOPEZ: We plan to make those workable for the

11:28:04 1 class action. I think we can. I mean, from the plaintiffs
2 perspective we're not asking for you to give us a different
3 scheduling order with respect to those issues.

4 THE COURT: Well, let me ask this question:
11:28:18 5 Oftentimes in class actions where certification is a
6 legitimate issue, you put off things like merits expert
7 disclosures until you find out if the class is certified to
8 save parties money in the event class isn't certified. Should
9 we do that in this case? Or do you want to launch into merits
11:28:40 10 experts in a class action that hasn't been certified?

11 MR. LOPEZ: Well, my spontaneous response to that is
12 I think because the certification may be too intertwined in
13 some of the expert issues, so my feeling is we're going to
14 need to at least do -- maybe we can parse that so you don't
11:29:05 15 have to go beyond and start talking about the type of injuries
16 or damages or what the class looked like. But to qualify as a
17 medical monitoring class and to get certified as a medical
18 monitoring class may require at least the report and the
19 deposition of an expert on each side.

11:29:27 20 THE COURT: Well, I would think so, but I guess the
21 question is do you want me to have a deadline that requires
22 disclosure of all experts by that date that will be used in
23 the class action?

24 MR. LOPEZ: I would say I'm not anticipating on the
11:29:43 25 plaintiff side more than probably two experts, so we're

11:29:48 1 comfortable staying within the scheduling order that we have.

2 And I'm talking about medical experts, staying within the
3 confines of the scheduling order you have to complete that
4 expert discovery. Or if you ask us to expedite it, we can

11:30:05 5 maybe front load those experts. These are issues medically
6 for us, I think, to deal with.

7 MR. NORTH: Your Honor, I'm not sure we have to
8 stretch all of this in a class certification hearing up until
9 next June --

11:30:22 10 THE COURT: Mic please.

11 MR. NORTH: -- which would be under the present
12 schedule.

13 I would suggest, off the top of my head, that we
14 finish fact discovery here in October and maybe, the more I
11:30:36 15 think about it, we do need a separate scheduling order as far
16 as we will need to depose sooner rather than later the named
17 putative class representatives to determine their adequacy to
18 serve in that role. And we'll need to depose them and that
19 will need to be done. So we've got some different
11:30:54 20 circumstances, the more I think about it, and therefore I
21 think a separate order may be necessary.

22 THE COURT: So how do you propose we proceed from
23 today?

24 MR. NORTH: What I would suggest, upon reflection, is
11:31:06 25 maybe we have 30 days to come up with a proposed order to see

11:31:11 1 if we can negotiate a proposed order and submit it to the
2 Court. And if not, we can put the dispute in a matrix form.

3 MR. LOPEZ: That seems like the right thing to do,
4 Your Honor.

11:31:22 5 THE COURT: I don't want a matrix on a case
6 management issue. We can resolve those more easily.

7 MR. LOPEZ: Except for the matrix part.

8 THE COURT: Let me pause and just ask a different
9 question. I just noticed it. I was just handed the
11:31:36 10 complaint. I see Elizabeth Cabraser is named as a member of
11 the steering committee. I want to disclose to you I know
12 Ms. Cabraser pretty well. She and I have served for the last
13 six years or longer on the Advisory Committee on the Federal
14 Rules of Civil Procedure. We've spent a lot of time working
11:31:58 15 on those issues. I'm going to continue working with her. I'm
16 not on that committee, but I'm sharing a related committee
17 now. It's that kind of relationship. But I've had lots of --
18 I've been in lots of meetings and had lots of conversations
19 with Ms. Cabraser. Do you see that as a problem, Mr. North?

11:32:16 20 MR. NORTH: I do not, Your Honor.

21 THE COURT: All right.

22 I'm taking it from your comments, Mr. Lopez, that you
23 think the fact discovery in the MDL is essentially the fact
24 discovery you need for the class action, maybe with the
11:32:37 25 exception of one or two additional depositions?

11:32:39 1 MR. LOPEZ: Yes, Your Honor.

2 THE COURT: How about from your side, Mr. North? Are
3 you anticipating that there's discovery you'll need to do for
4 the class action that is different than the discovery you
11:32:50 5 would do for the MDL?

6 MR. NORTH: Only, Your Honor, that we'll need to
7 depose the 13 named plaintiffs who seek to be class
8 representatives. And then any experts on the certification
9 issue.

11:33:06 10 THE COURT: Right. Is that something you think you
11 can comfortably do by October 28th?

12 MR. NORTH: I think we can, Your Honor, certainly.

13 THE COURT: Okay. Maybe what we ought to do is this,
14 and if I'm missing something, by all means tell me. Maybe we
11:33:24 15 ought to simply enter the order consolidating the class action
16 with this case, stating that the fact discovery deadline of
17 October 28th will apply in the class action, and then asking
18 the parties before the next status conference, which will
19 occur either in August or September, to confer about what
11:33:48 20 should happen beyond the October 28th fact discovery deadline.

21 Should we focus on class certification experts and class
22 certification hearing before we proceed to other experts?
23 Should we just adopt the schedule in the MDL for the purposes
24 of experts in the class action? And you can address that,
11:34:10 25 and, if you have different views, set forth your different

11:34:12 1 views in the joint report for the next status conference. And
2 at that point we can address it. You will have had a couple
3 of months working with both cases as part of one by that time.
4 And we can then decide whether we go straight to class
11:34:27 5 certification before merits experts or whether we do something
6 else.

7 Does that sound like a reasonable approach?

8 MR. LOPEZ: Yes, Your Honor.

9 MR. NORTH: Yes, Your Honor. One clarification.

11:34:37 10 Would it be the Court's expectation that we proceed with those
11 13 depositions --

12 THE COURT: Yes.

13 MR. NORTH: -- during the fact period?

14 THE COURT: Yes.

11:34:48 15 MR. NORTH: Okay.

16 THE COURT: Okay. Is this a 23(b)(3) class?

17 MR. LOPEZ: I'm sorry, Your Honor?

18 THE COURT: 23(b)(3) class you're alleging?

19 MR. LOPEZ: Yes.

11:35:03 20 THE COURT: Okay.

21 Okay. Are there other matters that you need to
22 raise, Mr. North?

23 MR. NORTH: Nothing further, Your Honor.

24 THE COURT: Okay. Let's talk -- first, I want to
11:35:14 25 circle back. My conclusion on the ESI discovery issue is that

11:35:24 1 the defendants should produce the ESI from the regional sales
2 managers. I think, having looked at the organizational
3 charts, that they're going to be important discovery sources
4 for purposes of relevant allegations in this case. I'd rather
11:35:40 5 get it done now because I'm virtually sure it would happen
6 later given their position in the organization.

7 So my resolution of that issue is that the defendants
8 should include those nine individuals in the ESI searches.
9 And I'll reflect that in the order that comes out after today.

11:35:58 10 As far as the next conference is concerned, my
11 inclination would be to set it for September 21st, which is a
12 Wednesday, unless you think we need to meet earlier in which
13 event we could do it during -- we could do it on August 23rd.
14 I'm happy to do it either time. I just can't judge from your
11:36:20 15 perspective how soon you think we need to be talking again.

16 MR. NORTH: I don't mean to be difficult but I'm
17 actually scheduled to be in Europe on a vacation from I think
18 the 15th through the 25th.

19 THE COURT: Of which month?

11:36:34 20 MR. NORTH: September.

21 MR. STOLLER: Your Honor, might I suggest something?
22 I actually think we're probably better off doing it in August
23 anyway. I mean, September 21's only a month until close of
24 fact discovery.

11:36:44 25 MR. NORTH: Yes.

11:36:45 1 MR. STOLLER: If those are the two options, I think
2 we prefer August even if it is a shorter case management
3 conference like we've had today.

4 THE COURT: Is that agreeable?

11:36:52 5 MR. NORTH: Yes, Your Honor.

6 THE COURT: Okay. We will set it for -- does that
7 look okay to you, Traci?

8 THE COURTROOM DEPUTY: August 23rd.

9 THE COURT: August 23, 10 a.m. I'll call for the
11:37:00 10 same joint report beforehand. I'll include that in the order
11 that comes out after today.

12 Are there any other matters we need to address?

13 MR. BOATMAN: No, Your Honor.

14 THE COURT: Okay. Thanks very much.

11:37:14 15 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 5th day of July, 2016.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter